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HAROLD E. WILLEY, Cl

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 859

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,

Appellants,

vs.

COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, CLAUDE T. SMITH, FRANK A. CRESPI, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,

Respondents.

On Appeal from the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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2140 Shattuck Avenue, Berkeley 4, California,
Attorney for Appellants.

FRANCIS T. CORNISH,
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Of Counsel.

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No.

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,

Appellants,

vs.

COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, CLAUDE T. SMITH, FRANK A. CRESPI, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,

Respondents.

On Appeal from the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pursuant to paragraph 2 of Rule 13 of the Rules of the Supreme Court of the United States, appellants

file this statement to show the basis of appellants' contention that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment from which this appeal is taken.

(a) OPINIONS DELIVERED BY COURTS BELOW.

The decision of the California Supreme Court from which this appeal is taken is a written opinion not yet officially reported. It may be found in 45 Advance California Reports, page 545, and 289 Pacific Reporter, 2nd Series, page 425. A copy of that opinion is appended hereto as Appendix 1.

(b) GROUNDS ON WHICH JURISDICTION INVOKED.

(i) The proceeding is a suit to quiet title to real property which the State of California and the County of Calaveras claim adversely as a result of enforcement of tax liens. It is contended that the liens are void. The right to remove such clouds is inherent. Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person*

> of life, liberty, or *property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

The right to sue the State of California for taking or damaging private property without paying compensation has been held by California Courts to be inherent.

California Constitution, Article I, Section 13 provides in part

> "* * * No person shall * * * be deprived of * * * property without due process of law * * *"

California Constitution, Article I, Section 14 provides in part

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * *"

For violation of these provisions no special statute authorizing suit is necessary.

Collier v. Merced Irrigation District (1931), 213 Cal. 554, 2 P. (2d) 790;

Clement v. State Reclamation Board (1950), 35 Cal. (2d) 628, 220 P. (2d) 897.

(ii) The judgment sought to be reviewed is the decision of the California Supreme Court, affirming the judgment of the Superior Court of the State of California, in and for the County of Calaveras which dismissed the complaint. The decision was rendered November 15, 1955. A rehearing was requested and it was denied December 14, 1955. This

made the judgment final and started the 90 day period for filing an appeal to this Court (*Market Street Railway Co. v. Railroad Commission of California* (1945), 324 U.S. 548, 550-552, 65 S. Ct. 770, 89 L. Ed. 1171, 1176-1177). Notice of Appeal was filed with the Clerk of the Supreme Court of the State of California of February 21st, 1956.

(iii) The statutory provision believed to confer jurisdiction of the appeal upon this Court is: Section 1257(2) of Title 28 of the United States Code, Stats. June 25, 1948, c. 646, § 1, 62 Stat. 929.

(iv) The cases believed to sustain the jurisdiction are the following:

Where a state Court entertained the question as to whether a state statute was repugnant to the United States Constitution and held that such statute was not repugnant and that it was valid, the United States Supreme Court has jurisdiction to review the decision of the state Court.

People of the State of New York ex rel. Bryant v. Zimmerman (1928), 278 U.S. 63, 49 Sup. Ct. 61, 73 L. Ed. 184;

Green Bay & M. Canal Co. v. Patten Paper Co. (1899), 172 U.S. 58, 19 Sup. Ct. 97, 43 L. Ed. 364;

St. Louis I.M. & S.R. Co. v. Starbird (1917), 243 U.S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917;

Whitney v. California (1927), 274 U.S. 357, 47 Sup. Ct. 641, 71 L. Ed. 1095.

The Supreme Court of the United States has jurisdiction on appeal to determine whether a statute,

not invalid on its face, is applied so as to transgress the Federal Constitution.

Fallbrook Irrigation District v. Bradley (1896), 164 U.S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369;

Iregea v. Modesto Irrigation District (1896), 164 U.S. 179, 17 Sup. Ct. 52, 41 L. Ed. 395;

Dahnke-Walker Milling Company v. Bondurant (1921), 257 U.S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239;

Fiske v. Kansas (1927), 274 U.S. 380, 47 Sup. Ct. 655, 71 L. Ed. 1108.

As frequently as the point has been presented to the highest state Courts they have uniformly decided that a statute of limitations cannot bar an owner in possession quieting his title against claims asserted by one out of possession, because to convert ownership into a mere right of action would deprive the owner of his property without due process of law. These decisions are:

Murrison v. Fenstermacher (1949), 166 Kan. 568, 203 P. (2d) 160, 7 A.L.R. (2d) 1360;

Long v. Boast (1907), 153 Ala. 428, 44 So. 955;

People ex rel. Deneen v. Simon (1898), 176 Ill. 165, 52 N.E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175;

Bradshaw v. Brady (1920), 43 S.D. 24, 177 N.W. 366;

Leavenworth v. Claughton (1944), 197 Miss. 606, 19 So. (2d) 815;

Dingey v. Paxton (1883), 60 Miss. 1038;

Johnston v. Ellsworth Trust Co. (1912), 63 Fla. 443, 58 So. 249;

Buty v. Goldfinch (1913), 74 Wash. 532, 133 Pac. 1057, 46 L.R.A. (N.S.) 1065, Ann. Cas. 1915A 604;

Taylor v. Miles (1870), 5 Kan. 498, 7 Am. Rep. 558;

Pinkham v. Pinkham (1900), 60 Nev. 600, 83 N.W. 837, Reh. 61 Neb. 336, 85 N.W. 285;

Robinson v. Glass (1884), 94 Ind. 211;

Mott v. Fiske (1900), 155 Ind. 597, 58 N.E. 1053;

Groesbeck v. Seeley (1865), 13 Mich. 329;

Baker v. Kelley (1866), 11 Minn. 480, Gil. 358;

Whitney v. Wegler (1893), 54 Minn. 235, 55 N.W. 927;

Case v. Dean (1867), 16 Mich. 12;

Charbonnet v. State Realty Co. (1923), 155 La. 1044, 99 So. 865.

In *Leffingwell v. Warren* (1862), 2 Black 599, 17 L. Ed. 261, this Court followed a contrary interpretation the Wisconsin Supreme Court in *Hill v. Kricke* (1860), 11 Wis. 442, placed on a statute of limitations of Wisconsin. That case was decided six years before the adoption of the Fourteenth Amendment to the United States Constitution. This Court has not been called upon to decide the question since, probably because no state Court has upheld a statute of limitations which precludes the owner in possession bringing an action to quiet his title.

(v) Validity of state statutes is involved. These statutes are Sections of the Revenue and Taxation Code of the State of California.

Section 175 of the Revenue and Taxation Code of the State of California provides:

> *"Tax deeds: Presumptions where action not commenced in year: Manner of prosecution.* All deeds heretofore and hereafter issued to the State of California or to any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later. Such proceedings may be prosecuted within the time limits above specified in the manner and subject to the provisions of Section 3618 of this code."

It is Section 1 of Chapter 1017 of California Statutes of 1945, page 1963. It may be found at page 31 of Volume 1 of Deering's Revenue and Taxation Code of California.

Section 3521 of the Revenue and Taxation Code of the State of California, provides:

> *"Proceedings to invalidate deed: Time for commencement: Application of Code Civ. Proc., §§351-358.* A proceeding based on an alleged invalidity or irregularity of any deed to the state for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the

state in the county recorder's office or within one year after June 1, 1941, whichever is later.

Sections 351 and 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section."

This is Section 8 of Chapter 290 of California Statutes of 1941, page 1426, and may also be found on page 208 of Volume 1 of Deering's Revenue and Taxation Code of California.

(c) THE QUESTIONS PRESENTED BY THE APPEAL.

The question presented is whether the Fourteenth Amendment to the United States Constitution will permit these statutes to be applied to deprive an owner, whose actual physical possession of real property has never been disturbed, of the right to quiet his title against void tax liens asserted by taxing agencies of the State. Appellant contends that the application of a statute of limitations to divest an owner of his property, although his actual physical possession has never been disturbed, is an unconstitutional taking.

(d) STATEMENT OF THE CASE.

Calaveras Central Mining Corporation owned several mining claims in Calaveras County, California. These claims were separately assessed. County taxes were levied and assessed against the properties separately during the fiscal year 1935-36. Upon default

in the payment of those taxes Calaveras County sold all of the parcels to the State of California as one single unit for the combined taxes levied against all. California law required that each be sold for the tax levied against it and no more. The California Courts have consistently condemned as void a sale made as this one was.

Brady v. Kelly (1877), 52 Cal. 371;
Knox v. Higby (1888), 76 Cal. 264, 18 Pac. 381;
Gillis v. Cleveland (1890), 87 Cal. 214, 218, 25 Pac. 351;
Stege v. City of Richmond (1924), 194 Cal. 305, 317, 228 Pac. 461, (Error Dismissed) 273 U.S. 648, 47 S. Ct. 245, 71 L. Ed. 821;
Gottstein v. Kelly (1929), 206 Cal. 742, 276 Pac. 347.

After this sale John DeLancey purchased the claims at a sale foreclosing an encumbrance which was against the property when the tax sale occurred. He immediately declared himself to hold in trust for beneficiaries, including Calaveras Central Gold Mining Company, Ltd., which was then in possession and has remained in uninterrupted actual physical possession ever since. Appellants, as trustees, are successors to DeLancey, who is deceased. The California Courts hold this intervening title prevents the defective tax sale proceedings from being corrected by subsequently enacted curative acts.

Miller v. McKenna (1944), 23 Cal. (2d) 774, 147 P. (2d) 531;
Hall v. Chamberlain (1948), 31 Cal. (2d) 673, 192 P. (2d) 759.

On July 1, 1943 a deed was made to the State. It was based only upon the void sale to the State. The State of California claims that by virtue of that deed it became, and ever since has been, the owner of the mining claims. Appellants claim that the California Courts having declared a tax sale so conducted to be wholly void no title passed to the State, and as owners in possession appellants are entitled to have their property declared free and clear of any cloud created by the void sale and tax deed to the State of California, and no statute of limitations can bar that right as long as their possession has never been disturbed.

This issue was raised by the complaint which alleged ownership (Clerk's Transcript, p. 1, line 26-p. 2, line 7), the void sale (Clerk's Transcript, p. 6, lines 9-26), and continuous possession (Clerk's Transcript p. 9, line 18-p. 10, line 4.) The respondents demurred that the complaint shows on its face that more than one year had elapsed since the deed to the State. (Clerk's Transcript, paragraphs III and IV, page 33, paragraph VII, page 38, paragraph VIII, page 39.)

The Court sustained the demurrer without leave to amend (Clerk's Transcript, page 45.) Following that order judgment was rendered. (Clerk's Transcript, pages 46-47.) A copy of the Judgment of Dismissal is appended hereto, as Appendix 2.

The point which this Court is asked to pass was raised by appellants on appeal in their opening brief, pages 26-29. The point was presented to the Supreme

Court of the State of California in the Petition for Hearing (pages 21-28), in Appellants' Supplemental Brief (pages 18-19), and in the Petition for Rehearing by the Supreme Court (pages 12-14.)

(e) THE FEDERAL QUESTION INVOLVED IS SUBSTANTIAL.

The power to tax is the life blood of government. Frequent irregularities in taxing processes have invalidated large portions of assessment rolls and many tax sales. Curative acts have been passed in an effort to correct some of these mistakes. Statutory rules of evidence create presumptions in favor of validity of tax proceedings. Nevertheless it has been uniform practice of title companies to require a judicial decree quieting title in order to divest the assessee of his ownership.

The right to own and enjoy property, and to have that right protected against unlawful invasion, is the cornerstone of our social and economic system. It works no hardship against a government, in the exercise of its power to tax, that it be required to follow lawful procedures, and avoid those proceedings which our Courts have declared to be void. An owner of property who is not disturbed in its enjoyment, should not be required at his peril to vigilantly search tax records and take affirmative action to invalidate proceedings at the peril of being divested of ownership by void proceedings should he fail to do so.

If followed, the decision of the California Supreme Court applying a statute of limitations against an owner in possession would enable every State to validate void tax proceedings by mere lapse of time, and deny the undisturbed owner a hearing to defend his good title. The example this decision sets for the other forty-seven States to validate their totally void tax proceedings against owners in undisturbed possession by statutes of limitations raises a Federal question which is so substantial this Court should consider it.

The question should be given plenary consideration, and this Court should receive briefs on the merits and oral argument for its resolution.

Dated, Berkeley, California,
April 4, 1956.

Respectfully submitted,
CHARLES O. BRUCE,
Attorney for Appellants.

FRANCIS T. CORNISH,
Of Counsel.

(Appendices 1 and 2 Follow.)

Appendix 1

In the Supreme Court of the State of California

In Bank

Sac. No. 6332

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,
Plaintiffs and Appellants,
vs.
COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, FRANK A. CRESPI, CLAUDE T. SMITH, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,
Defendants and Respondents.

This is an appeal from a judgment for the defendants following an order sustaining their demurrers without leave to amend.

The main purpose of the action is to have it declared that a deed issued to the State of California for delinquent ad valorem taxes for the fiscal year 1935-1936 is invalid. The real property consists of patented mining claims on four parcels of land and the minerals underlying another parcel.

It is alleged that the Calaveras Central Mining Corporation was the owner of the property on and prior to the first Monday in March, 1935; that on November 20, 1928, the corporation conveyed the property to one K. W. Cannon, as trustee, under a deed of trust recorded on December 4, 1928, for the benefit of one Helen Roesch in order to secure payment of money loaned to the corporation; that by virtue of that instrument Cannon was empowered to sell the property to satisfy the corporation's obligation to Roesch in the event of default, and that on February 9, 1938, the then trustee, Frank A. Trachsler sold the real property and improvements to one John S. DeLancey, who thereupon became the owner thereof and declared himself, prior to August 8, 1940, to hold the property in trust under the terms of a judgment of the Calaveras County Superior Court. The plaintiff Sears derives his title through John S. DeLancey as trustee by substitution effected on September 23, 1944, after the death of DeLancey. The interest of the plaintiff Nevada Investment and Finance Corporation stems from its purchase, as trustee, of all the placer gold in place in the five parcels of property from Sears on October 10, 1944.

It is further alleged that the Assessor of Calaveras County assessed these five parcels of real property separately for the year 1935-1936 and that the total ad valorem taxes levied for that year amounted to $750.50. The taxes were not paid and the property was sold to the state on June 29, 1936. There was no redemption. On July 2, 1943, the Assessor executed and recorded a deed to the state. It is alleged and therefore an admitted fact that the plaintiffs

were in the exclusive and undisputed possession of the property during all of the times involved.

The plaintiffs seek the annulment of the tax deed on the ground that the tax proceedings supporting the right of the county to deed the property to the state and the deed itself were invalid. They assert that the tax levied against the property exceeded the lawful rate levied generally in the county for 1935-1936; that the purchase price for which the property was sold to the state exceeded the legal amount, and that the separate parcels were improperly sold and deeded to the state as a single unit.

The defendants interposed demurrers alleging that the action is barred by the limitations contained in sections 175 and 3521 of the Revenue and Taxation Code. Section 175, enacted in 1945, provides that "All deeds heretofore and hereafter issued to the State of California . . . by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a Court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later." Section 3521 provides that "A proceeding based on an alleged invalidity or irregularity of any deed to the state for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the state in the county recorder's office or within one year after June 1, 1941, whichever is later." Both of these sections are stat-

utes of limitation. (People v. Chambers, 37 Cal. 2d 552; McCaslin v. Hamblen, 37 Cal. 2d 196; Tannhauser v. Adams, 31 Cal. 2d 169; Sheeter v. Lifur, 113 Cal. App. 2d 729.) The defendants argue that the action is barred because the plaintiffs filed their complaint in 1948, more than one year after the enactment of section 175 and more than one year after the tax deed was executed and recorded. It is obvious that if these sections are applicable the plaintiffs are precluded from asserting the invalidity of the tax deed in this action. The plaintiffs contend, however, that the sections do not foreclose an owner in exclusive and undisputed possession of the taxed property from attacking the asserted validity of the deed. The contention is based upon implications which they draw from the opinions of this Court in Tannhauser v. Adams, supra, 31 Cal. 2d 169, and McCaslin v. Hamblen, 37 Cal. 2d 196.

The contention that a statute limiting the time for the commencement of an action to set aside a deed to the state for delinquent taxes does not apply to an owner in exclusive and undisputed possession of the property taxed, is largely based on a rule stated to be that a general statute of limitations does not run against such an owner to remove a cloud upon his title. It may be assumed that such is the general rule. (See Maguire v. Hibernia S. & L. Soc., 23 Cal. 2d 719; Newport v. Hatton, 195 Cal. 132; Secret Valley Land Co. v. Perry, 187 Cal. 420; S.F. Unified School District v. City & County of San Francisco, 54 Cal. App. 2d 105; Crane v. French, 39 Cal. App. 2d 642; Faria v. Bettencourt, 100 Cal. App. 49, 51-52.)

But the general rule does not apply as against a special statute of limitation foreclosing the commencement of an action to set aside a deed to the state for delinquent taxes beyond one year from and after the recording of the deed to the state. Here the facts stated as constituting the alleged defects in the deed all occurred prior to the execution and recordation of the deed. None of the alleged defects in the deed were jurisdictional in the sense that the curative act of 1943 (Stats., 1943, page 1993) would not apply; nor is the deed claimed to be void on its face. If the contention of the plaintiffs should prevail the finality of tax proceedings would be thrown into confusion. The validity of tax deeds as against an owner in possession of real property would be placed in suspension for an indefinite period and until at his election he chose to attack it. Without limit of time he could defend against it. There appears to be no reason why an owner of land, although in exclusive and undisputed possession, should not be required to be alert to protect his rights as against his own delinquency in the payment of taxes. He is charged with notice that if he claims the invalidity of a tax deed to the state or of the proceedings leading up to it he must bring his action for that purpose within the statutory time.

The improper creation of the tax lien and recordation of the deed to the state do more than merely give rise to a permissible cause of action in favor of the land owner. They also start the running of the special statute of limitations applicable to such an owner. If he does not move to protect his rights as

against the tax by payment, redemption, or timely and successful attack upon the tax deed or the proceedings leading up to it, he is divested of his title. After the statutory period has run the tax deed transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant.

It is contended by the plaintiffs that this Court, at least by implication, has ruled otherwise or recognized a contrary rule in Tannhauser v. Adams, supra, 31 Cal. 2d 169. It was said in that case, at page 176: "Regardless of what may be the law under other circumstances, it appears to us that there is no sound reason why the right of one out of possession to attack a tax title for the defect here relied upon, whether it be considered jurisdictional or otherwise, should not be barred if his action is not instituted within the prescribed statutory period, provided that such period is a reasonable one."

It is not claimed that this Court or any Court of this state has directly and finally decided that sections 175 and 3521 of the Revenue and Taxation Code do not apply to an owner in possession. Nor is it contended that any case decided in this state directly involved the point. But it is contended that by indirection the Courts of the state have approved the rule contended for by the plaintiffs. It is true as stated by them that what was said in the cases in this state on the subject was obiter. The plaintiffs say that "In McCaslin v. Hamblen, 37 Cal. 2d 196, the dictum in Tannhauser v. Adams was approved, the Court saying: 'Assuming that the rule might have application in a case where the plaintiff is the original tax-

delinquent owner in undisturbed possession, it would seem right to conclude that a generalization applicable merely to "owners in possession" is too broad.' " (See Elbert, Ltd. v. Gross, 41 Cal. 2d 322.) Such an expression is not to be taken as the announcement of a rule that an owner in possession of real property is not bound by a valid statute of limitations with reference to tax-delinquent proceedings, the same as an owner not in possession. There is no contention that it is not within the power of the state, through its legislature, to provide for such statutes of limitations as those now before us. As applied to the facts in this case there can be no question of their validity and proper application. This necessarily includes the proceedings leading up to the issuance of the tax deed, such as the alleged fraudulent and otherwise overvaluation of the land, the excessive tax rate and sale price, and the sale in block instead of in parcels.

It is concluded that the plaintiffs are barred by statute from attacking the tax deed and all proceedings prior to its issuance and recordation. Since the state's title to the property has not been successfully attacked, the plaintiffs asserted objections to the assessments made after the execution and delivery of the deeds are futile.

The judgment is affirmed.

Shenk, J.

We concur: Gibson, C. J. Edmonds, J., Carter, J., Traynor, J., Schauer, J., Spence, J.

Filed, November 15, 1955,
William I. Sullivan, Clerk.

Appendix 2

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Defendants and Respondents.

JUDGMENT

In the above entitled action defendants County of Calaveras, George G. Braddock, A. J. Gianelli, Marvin L. Waters, Claude T. Smith, Frank A. Crespi,

Frank Langford, and Board of Supervisors of Calaveras County, by their attorney, Virgil M. Ariola, District Attorney of the County of Calaveras, having appeared and demurred to the plaintiffs' third amended complaint herein, and defendant State of California, by its attorneys, Fred N. Howser, Attorney General of the State of California, James E. Sabine, Deputy Attorney General, and Irving H. Perluss, Deputy Attorney General, having also appeared and demurred to the plaintiffs' complaint herein, and the issue of law thereto arising having been duly submitted to the Court by the parties, and the Court being fully advised in the premises, did, on the 30th day of December, 1950, sustain said demurrers and refused leave to plaintiffs to amend their third amended complaint;

Now, Therefore, it is ordered, adjudged and decreed that plaintiffs take nothing by their action, and that said defendants have and recover their costs herein, taxed at $.....

Dated this 6th day of January, 1951.

Ralph McGee,
Judge of the Superior Court.

(Endorsed) Filed Jan. 8, 1951,
John Squellati, County Clerk.

MAY 25 1956
HAROLD B. WILLEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 859

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,

Appellants,

vs.

COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, CLAUDE T. SMITH, FRANK A. CRESPI, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,

Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

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In the Supreme Court
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OCTOBER TERM, 1955

No. 859

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,

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COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, CLAUDE T. SMITH, FRANK A. CRESPI, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,

Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

This case presents the question whether a State statute which provides, or is interpreted to provide, lapse of time bars the right of an owner of real

property who is in complete, actual, uninterrupted physical possession to bring an action to remove a cloud on his title asserted by an adverse claimant who has never been in possession, deprives that owner of his property without due process of law.

This question has not been decided by this Court since the Fourteenth Amendment to the United States Constitution became effective.

Appellees move to dismiss this appeal. First, they contend this constitutional question was not properly raised. Second, they contend this constitutional question is not presented. Third, they contend that if this constitutional question is presented it is not substantial. In demonstrating their contentions they misrepresent the case.

HOW THE QUESTION AROSE.

Appellants own five parcels of land in California. California law allows the County of Calaveras to levy and collect an annual tax upon that land. The statutes which give the County of Calaveras that power also provide a method for the lawful exercise of that power, and provide that if that power is lawfully exercised and the appellants do not pay the tax levied ownership of their property is transferred to the State of California. These statutes also provide for sufficient notice and opportunity for a hearing so that they fully meet the due process requirements of the

Fourteenth Amendment to the United States Constitution.

Chapman v. Zobelein (1915), 237 U.S. 135, 35 S.Ct. 518, 59 L.Ed. 874.

Calaveras County did not follow the method provided by the statutes in taxing or in enforcing collection of the tax levied upon appellants' property. Instead Calaveras County took a different method, one which the Courts of California have repeatedly held to be ineffective and void, to create no rights, and to pass no title to the State of California.[1]

The State of California attempted to correct these totally void proceedings by adopting a curative act.[2] The California Supreme Court twice held this act was ineffective to cure the State's defective title if a third person (appellants here) had acquired title[3] after the void tax proceedings and before the curative act was passed.[4]

In spite of these decisions appellees assert that these wholly void tax proceedings transferred ownership of appellants' property to the State of California, with

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[1]*Brady v. Kelly* (1877), 52 Cal. 371;
Knox v. Higby (1888), 76 Cal. 264, 18 Pac. 381;
Gillis v. Cleveland (1890), 87 Cal. 214, 218, 25 Pac. 351;
Stege v. City of Richmond (1924), 194 Cal. 305, 317, 228 Pac. 461 (error dismissed), 273 U.S. 648, 47 S. Ct. 245, 71 L. Ed. 821;
Gottstein v. Kelly (1929), 206 Cal. 742, 276 Pac. 347.
See Jurisdictional Statement, p. 9.

[2]California Statutes 1943, Chapter 458, page 1993.

[3]See Jurisdictional Statement, Appendix p. ii.

[4]*Miller v. McKenna* (1944), 23 Cal. (2d) 774, 147 P. (2d) 531;
Hall v. Chamberlain (1948), 31 Cal. (2d) 673, 192 P. (2d) 759.

the right to force a sale of the properties unless appellants pay appellees a sum which appellees designate "redemption penalties". Under existing California law appellees have no right to cause the sale nor to demand the penalties.

The threat from such a cloud impairs the value of appellants' properties and is as much a taking of appellants' properties, within the meaning of the Fourteenth Amendment to the United States Constitution, as would be the evicting of appellants and excluding them of all indicia of ownership.

Campbell v. Holt (1885), 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483;

Buchanan v. Warley (1917), 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149;

Terrace v. Thompson (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255;

Tyson & Bro. v. Banton (1926), 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718.

This action was filed for the purpose of removing that cloud so it would no longer impair the value of appellants' properties. Appellees interposed a demurrer contending that sections 175 and 3521 of the Revenue and Taxation Code of the State of California[5] bar the action.

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[5]For text see Jurisdictional Statement, p. 7.

THE CONSTITUTIONAL QUESTION WAS PROPERLY RAISED.

The California law permits no responsive pleading to a demurrer,[6] hence appellants' opposition to the demurrer asserting the unconstitutionality of applying the statutes of limitations to bar an owner in possession is not in the written record. The only reason appellants alleged that they were in actual physical possession[7] was because in the Court of first instance appellants took a dual position. First, they contended that the statutes of limitations pleaded should be construed so as not to run against an owner in possession.[8] This was a question of State law. Second, appellants argued that if the statutes of limitations were construed to bar an action by an owner

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[6]California Code of Civil Procedure, Section 422, provides:
"The only pleadings allowed on the part of the plaintiff are: 1. The complaint; 2. The demurrer to the answer; 3. The demurrer to the cross-complaint; 4. The answer to the cross-complaint."

[7]The California Supreme Court said:
"It is alleged and therefore an admitted fact, that the plaintiffs were in the exclusive and undisputed possession of the property during all of the times involved." (Jurisdictional Statement, Appendix, pp. ii-iii.)

[8]The California Supreme Court said:
"The contention that a statute limiting the time for the commencement of an action to set aside a deed to the state for delinquent taxes does not apply to an owner in exclusive and undisputed possession of the property taxed, is largely based on a rule stated to be that a general statute of limitations does not run against such an owner to remove a cloud upon his title. It may be assumed that such is the general rule. See Maguire v. Hibernia S. & L. Soc., 23 Cal. 2d 719; Newport v. Hatton, 195 Cal. 132; Secret Valley Land Co. v. Perry, 187 Cal. 420; S. F. Unified School District v. City & County of San Francisco, 54 Cal. App. 2d 105; Crane v. French, 39 Cal. App. 2d 642; Faria v. Bettencourt, 100 Cal. App. 49, 51-52." (Jurisdictional Statement, Appendix p. iv.)

in complete, actual, uninterrupted physical possession of real property those statutes, or such a construction of those statutes, would violate the Fourteenth Amendment of the United States Constitution. This was a federal question. Appellants have pressed both positions consistently ever since.[9] The basis for appellants' second contention, defending against the demurrer, was statements of the Supreme Court of the State of California in *Tannhauser v. Adams* (1947), 31 C. (2d) 169, 174-176, which infer that the statutes of limitations involved could not run against an owner of real property in possession, and 34 *American Jurisprudence,* pages 29 and 296, is cited with approval.[10]

THE CONSTITUTIONAL QUESTION IS PRESENTED BY THIS CASE.

Contrary to the contention of appellees, the California Supreme Court did not declare valid either the tax sale or the tax deed which were attacked by this action. This quesiton was never presented to the California Court, because in sustaining the demurrer based upon the Statutes of Limitations the Court dismissed the action, holding it was filed too late. This ruling made a decision on the merits of the cause of action neither necessary nor proper. Nor did the California Supreme Court overrule any of its prior decisions holding such a tax sale or such a tax deed void,[11] or

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[9]See Jurisdictional Statement, pages 10-11.

[10]See Opinion of the Supreme Court, Appendix vi.

[11]See cases cited in footnote 1.

not subject to correction by a curative act passed after a third person had acquired ownership following the void tax sale or void tax deed.[12] The language quoted by appellees[13] is dictum. The California Supreme Court squarely held:

> "It is concluded that the plaintiffs are barred by statute from attacking the tax deed and all proceedings prior to its issuance and recordation."
> Jurisdictional Statement, Appendix, p. vii.

After conceding the general rule that a statute of limitations does not run against an owner in possession,[14] the California Supreme Court held:

> "But the general rule does not apply as against a special statute of limitation foreclosing the commencement of an action to set aside a deed to the state for delinquent taxes beyond one year from and after the recording of the deed to the state."
> Jurisdictional Statement, Appendix, p. v.

The California Supreme Court gave its reason for deciding that sections 175 and 3521 of the Revenue and Taxation Code of California bar an action by an owner in complete, actual, uninterrupted physical possession:

> "If the contention of the plaintiffs should prevail the finality of tax proceedings would be thrown into confusion. The validity of tax deeds as against an owner in possession of real property would be placed in suspension for an indefinite

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[12]See cases cited in footnote 2.
[13]Motion to Dismiss, p. 9, footnote.
[14]See footnote 8, supra.

period and until at his election he chose to attack it. Without limit of time he could defend against it. There appears to be no reason why an owner of land, although in exclusive and undisputed possession, should not be required to be alert to protect his rights as against his own delinquency in the payment of taxes. He is charged with notice that if he claims the invalidity of a tax deed to the state or of the proceedings leading up to it he must bring his action for that purpose within the statutory time."

Jurisdictional Statement, Appendix, p. v.

The California Supreme Court explained the effect which it desired by its construction of these sections:

"The improper creation of the tax lien and recordation of the deed to the state do more than merely give rise to a permissible cause of action in favor of the land owner. They also start the running of the special statute of limitations applicable to such an owner. If he does not move to protect his rights as against the tax by payment, redemption, or timely and successful attack upon the tax deed or the proceedings leading up to it, *he is divested of his title. After the statutory period has run the tax deed transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant.*" (Emphasis ours.)

Jurisdictional Statement, Appendix, pp. v-vi.

The decision of the California Supreme Court from which this appeal is taken is therefore a positive determination that Sections 175 and 3521 of the Revenue and Taxation Code of California bar an owner in

complete, actual, uninterrupted physical possession from attacking a tax deed because to rule otherwise would render void tax proceedings subject to attack indefinitely. It is a declaration that the effect of the running of the statute of limitations is to transfer the title of the owner in possession to the State of California with the same effect as a voluntary grant. Appellants contend this procedure violates the due process requirements of the Fourteenth Amendment to the United States Constitution, and raises the constitutional question which this case presents.

Although the California Supreme Court said:

> "There is no contention that it is not within the power of the state, through its legislature, to provide for such statutes of limitations as those now before us. As applied to the facts in this case there can be no question of their validity and proper application."
>
> Jurisdictional Statement, Appendix, p. vii.

this statement ignores the admitted fact that appellants raised this constitutional question before the Appellate Courts of California.[15] There is no requirement that a party labor a point or be deemed to have waived it.

It follows that if an owner, whose possession and enjoyment of real property has never been disturbed, cannot be divested of all indicia of ownership merely by the running of a statute of limitation, the fact that he may ransom his property by paying "redemption

[15]Jurisdictional Statement, pages 10-11, Motion to Dismiss, pages 6-8.

penalties" which could not have been legally collected if the statute of limitations had not run, leaves the owner none the less deprived of property without due process within the meaning of the Fourteenth Amendment to the United States Constitution.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The effect of the decision of the California Supreme Court is that totally void tax proceedings may be made valid by the running of a statute of limitations. The mere passage of time "transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant."[16] Neither a hearing nor notice is provided.

While statutes of limitations which bar the right of one out of possession to bring an action to recover property have uniformly been upheld, statutes which convert the ownership of one in full, complete, undisturbed possession of real property into a mere cause of action against another who has never been in possession have uniformly been held by the State Courts to deprive the owner of his property without due process of law.[17]

If the decision of the California Supreme Court should be followed by other Courts as a holding that statutes of limitations operate to divest the property

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[16]Taken from Opinion of the California Supreme Court, Jurisdictional Statement, Appendix, p. vi.

[17]See Jurisdictional Statement, pp. 5-6, for the cases.

of an owner who is in full, complete, undisturbed possession of it, there is no limit to the extent legislatures may go in validating totally void acts of the State, as well as those of private citizens.[18]

Two concepts must be kept in mind. First, the proceedings by which the State of California derived title were wholly void and ineffective for that purpose. Second, the State of California never attempted by interfering in any way with appellants' full enjoyment of their property to exercise any of the rights it claims to have acquired. The State of California has been more neglectful than appellants. Appellants have enjoyed rights which they claim, whereas appellees have not enjoyed any of the rights which they assert.

If the decision of the California Supreme Court is permitted to stand, all legal requirements for levy and collection of taxes can be discarded. Any tax, no matter how levied, and any enforcement proceedings, no matter how conducted, will become valid at the end

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[18]In 1953 the California Legislature adopted Stats. 1953, Ch. 1655, Sec. 1(b), (Section 177(b) Revenue & Taxation Code of California), which provides:

> "A defense based on an alleged invalidity or irregularity of any deed heretofore or hereafter issued upon the sale of property by any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, in the enforcement of delinquent property taxes or assessments, or a defense based on an alleged invalidity or irregularity of any proceedings leading up to such deed, can only be maintained in a proceeding commenced within one year after the date of recording of such deed in the county recorder's office or within one year after June 1, 1954, whichever is later."

The validity of that statute is not involved in this case, but it is illustrative of how far State legislatures try to extend statutes of limitations to correct and validate totally void acts of incompetent or careless public officers and to divest people of their property.

of a year unless within that time the property owner takes affirmative action to obtain a judicial declaration that what is null and void in fact is equally null and void in law.

The question whether the Fourteenth Amendment to the United States Constitution permits a State to transfer to itself the title of an owner who is in actual, undisturbed physical possession of his land merely by passage of time, during which the State makes no effort to enforce the ownership it asserts, is serious and substantial, and should not be resolved without a hearing, after the law involved has been fully briefed.

Dated, Berkeley, California,
May 21, 1956.

CHARLES O. BRUCE,
Attorney for Appellants.

FRANCIS T. CORNISH,
Of Counsel.

MAY 10 195
HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 859

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,
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Appellees.

Appeal From the Supreme Court of the State of California

MOTION TO DISMISS

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Appellees.

Appeal From the Supreme Court of the State of California

MOTION TO DISMISS

Appellees above named, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss the appeal in the above entitled case on the grounds: (a) that the federal question sought to be raised by this appeal was neither timely or properly raised, nor expressly passed upon by the court below; and (b) that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

This case involves a proceeding under the ad valorem property tax law of the State of California [Article XIII, California Constitution; Division 1 (Sections 1 to 5143, inclusive), California Revenue and Taxation Code], whereunder several mining claims formerly owned by the Calaveras Central Mining Corporation were deeded to the State of California for nonpayment of the ad valorem property taxes levied by appellee County of Calaveras for the Fiscal Year 1935-1936. The main purpose of the action was to have it declared that the deed issued to the State of California for delinquent ad valorem taxes for the Fiscal Year 1935-1936 was invalid. The real property consists of patented mining claims on four parcels of land and the minerals underlying another parcel.

The complaint alleged the devolution of title from the Calaveras Central Mining Corporation, the owner of the property on and prior to the first Monday in March, 1935, to its present owners, plaintiff and appellant Sears, as trustee by substitution under the terms of a judgment of the Calaveras County Superior Court and to plaintiff and appellant Nevada Investment and Finance Corporation, which purchased, as trustee, all the placer gold in place in five parcels of property from Sears (Complaint, First Cause of Action, Paragraphs I, III, IV, VI, VIII, Cl. Tr., p. 1, pp. 7-10;

Second Cause of Action, Paragraphs II, III, Cl. Tr., pp. 11-12). It was further alleged that the Assessor of Calaveras County assessed these five parcels of real property separately for the year 1935-36 and that the total ad valorem taxes levied for that year amounted to $750.50. The taxes were not paid and the property was "sold"[1] to the State on June 29, 1936 (Complaint, Paragraph II, Cl. Tr., pp. 6-7). There was no redemption. On July 2, 1943, the County Tax Collector executed and recorded a deed to the State (Complaint, Paragraph V, Cl. Tr., p. 8). It was alleged that the plaintiffs were in the exclusive and undisputed possession of the property during all of the times involved (Complaint, Paragraph VII, Cl. Tr., pp. 9-10).

Plaintiffs and appellants sought the annulment of the tax deed on the ground that the tax proceedings leading up to and including the deed to the State were invalid. Defendants and appellees interposed demurrers (Cl. Tr., pp. 32-36, pp. 37-44) on the grounds that all of the alleged defects were cured by the applicable curative act (Chapter 458, California Statutes

[1] The term "sold" as used herein is a technical term to designate the sale by operation of law and the declaration of the county tax collector which occurs not less than 21 nor more than 28 days after the publication of the delinquent list on or before June 8th of each year following the year for which the taxes were due and which sets in motion the five-year period at the end of which the property is deeded to the State (see Sections 3436, 3511, California Revenue and Taxation Code, which are set out in the Appendix hereto).

1943, page 1993),[2] and that the action was barred by the limitations contained in sections 175 and 3521 of the California Revenue and Taxation Code.

Plaintiffs and appellants asserted that the tax levied against the property exceeded the lawful rate levied generally in the county for 1935-1936; that the purchase price for which the property was sold to the State exceeded the legal amount, and that the separate parcels were improperly sold to the State as a single unit. No claim was made nor was it alleged that the deed was void on its face. Defendants and appellees took the position that none of the alleged defects was jurisdictional in the sense that the Curative Act of 1943, cited above, would not apply, and that the action was barred by the statutes of limitations cited above.

The Supreme Court of California rejected plaintiffs' and appellants' contentions and held that the alleged defects, if any, were cured by the curative act cited and that the statutes of limitation barred the action. A petition for rehearing was also denied by the court.

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[2] While the specification of this ground does not appear in the demurrers proper, the curative acts were cited in the memoranda of points and authorities filed therewith. Appellees also cited the following other curative statutes, passed every two years following the Curative Act of 1943, which are to the same effect: California Statutes of 1945, Chapter 1134, page 2176; California Statutes of 1947, Chapter 605, page 1615; California Statutes of 1949, Chapter 781, page 1508; California Statutes of 1951, Chapter 494, page 1647; California Statutes of 1953, Chapter 978, page 2465. All code sections and statutes individually cited in this motion, with the exception of those cited in this footnote, are set forth in the Appendix hereto.

It is respectfully submitted that the action of the Supreme Court of the State of California was entirely proper, and that the cases cited by appellants at pages 5-6 of the Jurisdictional Statement have no bearing on the determination herein, for the following reasons:

(a) The controversy in those cases was between an owner in possession and a private purchaser or adverse possessor, in which the statute attempted finally and absolutely to divest the owner in possession of his property.

(b) The California Supreme Court has held the tax deed to the State involved herein to be valid.

(c) Even more important, plaintiffs and appellants have not been deprived of the right to redeem the property by the judgment that the tax deed was valid, or at all.

Section 4101, California Revenue and Taxation Code, which is set out in the appendix hereto, provides that tax-deeded property may be redeemed until the right of redemption has been terminated. In this case, no proceedings have been taken to sell the property by public auction sale under Chapter 7, Part 6, Division 1, of the Revenue and Taxation Code, or by sale to another taxing agency under Chapter 8, Part 6, Division 1, of the code, the usual methods of terminating the right of redemption, nor have any other proceedings been taken which would have that effect. Although the plaintiffs and appellants were barred from attacking the validity of the tax deed and all pro-

ceedings prior to its issuance and recordation, they were not and are not now barred from redeeming the property by paying the amount necessary to redeem, i.e., the taxes, penalties and costs prescribed by Section 4102, California Revenue and Taxation Code. (See *Peterson* v. *Johnson,* 39 Cal. 2d 745, at 748, 249 Pac. 2d 17, at 19 (1952).)

I. THE SUGGESTED FEDERAL QUESTION WAS NOT RAISED IN THE COURT OF FIRST INSTANCE AS REQUIRED BY RULE 15(1)(d) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES OR PASSED UPON BY THE COURTS BELOW

The question whether the Fourteenth Amendment to the Constitution will permit a state court to apply statutes of limitation to the right of a former owner in possession to contest the validity of tax proceedings leading up to and including a tax deed to the State foreclosing tax liens was not raised by appellants in the court of first instance as required by the second sentence of Rule 15(1)(d) of the Revised Rules of the Supreme Court of the United States nor was the question passed upon by any of the courts below. It is a rule of long standing, of course, that the attempt to raise a federal question after judgment comes too late, unless the state court actually entertains the question and decides it. (*Herndon* v. *Georgia,* 295 U. S. 441, 443 (1935), and cases there cited, rehearing denied 296 U. S. 661.)

As indicated at pages 10-11 of appellants' Jurisdictional Statement on file herein and as disclosed by

the record (Complaint, Cl. Tr., pp. 1-31), the question sought to be presented to this Court was not raised at all until appellants filed their opening brief on appeal with the District Court of Appeal, Third Appellate District, State of California, at pages 26-29 thereof. Nowhere in the record on appeal from the court of first instance, the Superior Court of the State of California, in and for the County of Calaveras, is there to be found any reference to the suggested federal question sought to be reviewed, and, in point of fact, said question was not raised in the court of first instance as required by Rule 15(1)(d) of the Revised Rules of the Supreme Court of the United States. It is, of course, well settled that only the constitutional issues raised in the lower courts are before the Supreme Court of the United States on appeal. (*Shelley* v. *Kraemer,* 334 U. S. 1, 8 (1948).)

Moreover, even when raised for the first time in Appellants' Opening Brief on appeal filed with the District Court of Appeal, Third Appellate District, State of California, reference to pages 28-29 thereof reveals that there was only a bare assertion of the suggested federal question without the benefit of any authorities to support the assertion. Appellants did not at that time show any other indication that they were relying on the point and it was not mentioned again until they filed their Petition for Hearing by the Supreme Court of the State of California (pages 24-28 thereof). To give the Supreme Court of the

United States jurisdiction on appeal from a state court, the mere assertion or bare averment of a federal question or of a claim of some constitutional right is not enough, but there must be a real and substantial controversy of the required character which deserves serious attention.

Hamblin v. *Western Land Co.*, 147 U. S. 531 (1893);

U. S. Fidelity & Guaranty Co. v. *State of Oklahoma*, 250 U. S. 111 (1919);

Herndon v. *Georgia*, 295 U. S. 441 (1935), *supra.*

It is respectfully submitted that the principles discussed above are directly applicable to the appeal herein. Appellants did not choose to rely upon their claim of constitutional right in the court of first instance nor did they as much as cite authorities on that question until they filed their Petition for Hearing by the Supreme Court of the State of California. For this reason and the reasons hereinbefore discussed, appellants should not now be heard to assert the unconstitutionality of the statutes in question as herein applied.

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL

Although plaintiffs and appellants did not raise their suggested federal question in the court of first instance, for the sake of completeness, we shall briefly discuss the problem. Appellants have attempted to

present their suggested federal question in a form which appears to support their assertion that it is substantial. However, the record discloses that their contentions are erroneous and without merit.

It must first be pointed out that the Supreme Court of the State of California held that the deed to the State was valid and that none of the alleged defects was jurisdictional in the sense that the curative act would not apply.[3]

Appellants' basic arguments, upon which they claim a breach of their constitutional rights, are predicated on an assumption which is false, that is, that the California courts have said that a tax sale and tax deed to the State under the circumstances here presented is void and cannot be cured and that no title passed to the State. The fallacy of appellants' position is that the Supreme Court of the State of California has passed upon the sale and tax deed actually made in this case and has held to the contrary. This being so, it would appear that appellants are asking this court to reverse the California Supreme Court on a point of California law.

[3] The decision of the Supreme Court of the State of California, which is set forth in full in the appendix to appellants' Jurisdictional Statement, stated at 45 Advanced California Reports 545, at 548, 289 Pac. 2d 425, at 426-427 that:

"* * * Here the facts stated as constituting the alleged defects in the deed all occurred prior to the execution and recordation of the deed. None of the alleged defects in the deed were jurisdictional in the sense that the curative act of 1943 (Stats., 1943, page 1993) would not apply; nor is the deed claimed to be void on its face. * * *"

While plaintiffs and appellants have attempted to buttress their position on general constitutional grounds by the cases cited at page 3 of their Jurisdictional Statement, those cases involve the problem of inverse condemnation and are not in point herein. Moreover, this Court has held that the provisions of the California law relating to the foreclosure of tax liens through a tax sale, giving the owner an opportunity to be heard as to the fairness of the original assessment, providing notice with respect to the time and place of sale, and continuing the right to redeem up to the time the State actually entered or sold, do not deprive the owner of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Chapman v. *Zobelein*, 237 U. S. 135 (1915).

This is not a case where the statute makes void deeds valid by mere lapse of time nor does it, in effect, convert ownership into a mere right of action to be asserted within a specified period of time regardless of possession by the owner. All that is barred by the statutes of limitation here involved is the procedural remedy granted to plaintiffs and appellants to test the validity of the deed and the proceedings leading up to it.

It is apparent, therefore, that none of the cases cited by appellants at pages 5-6 of their Jurisdictional Statement support their position, for even assuming *arguendo* that a statute which, regardless of possession

by the owner reduces title to real estate to a mere right of action to be asserted within a prescribed period of time constitutes an unconstitutional taking of property without due process of law, the cases so holding are not in point in this proceeding. As hereinbefore pointed out, this is not a controversy between an owner in possession and a third person under a statute divesting ownership without a hearing but is a proceeding by the former owner to contest the validity of tax proceedings against the very agencies that levied the taxes, wherein the plaintiffs and appellants still have the right to redeem the property. Moreover, the tax deed is not void as asserted by appellants but has been held valid by the highest court of the State.

It is therefore apparent that appellants' assertion that the application of the statutes of limitation against them would deprive them of their property without due process of law is erroneous and without merit. Plaintiffs and appellants were not and are not now barred from redeeming the property and whatever the rule may be in a situation where the property has been sold by the State to a third party, thereby terminating the right of redemption, the concept that a statute of limitation does not run against an owner in possession has no application herein. As previously pointed out, under the state law, redemption of real property sold or deeded to the State for delinquent property taxes may be effected until the right is terminated by one of several

alternative methods set forth in the statute. None of these proceedings has been taken and plaintiffs and appellants still have the right to redeem the property.

Accordingly, it is respectfully submitted that there is in point of fact no federal question presented by the record and, further, even assuming for purposes of argument that there is a federal question, it is not substantial. This is so because appellants, like all taxpayers, knew that the property was subject to taxation and that the taxes levied thereon were required to be paid. By virtue of the delinquency in payment of these taxes, proceedings to enforce their collection were commenced and such proceedings have been held to be valid under the laws of the State of California by the highest court of the State.

CONCLUSION

It is respectfully submitted that the appellants present no substantial federal question for the

decision of this Court and that the appeal should be dismissed.

Respectfully submitted,

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Appendix

Explanatory Note: Many of the present provisions of the California Revenue and Taxation Code were formerly contained in the California Political Code, which provisions were codified as Division 1 of the Revenue and Taxation Code by California Statutes of 1939, Chapter 154, effective February 1, 1941. The sections of the Revenue and Taxation Code set forth in this appendix are those which were in effect during the pendency of the present litigation. Wherever the provisions applicable to the case at bar were different at the time the particular step prescribed in the statute was taken, the provision then applicable will be set forth parenthetically, so far as pertinent to the discussion herein.

California Revenue and Taxation Code, Section 175:

"All deeds heretofore and hereafter issued to the State of California or to any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later. Such proceedings may be prosecuted within the time limits above specified in the manner and subject to the provisions of Sections 3618 to 3636 of this code." (Added by California Statutes of 1945, Chapter 1017, section 1, page 1963, in effect September 15, 1945.)

California Revenue and Taxation Code, Section 3436:

"Not less than 21 nor more than 28 days after the first publication of the published delinquent list, at the time fixed in the publication, the real property on which the taxes, assessments, penalties, and costs have not been fully paid, except tax-sold property and possessory interests, shall by operation of law and the declaration of the tax collector be sold to the State. The sale shall be in the tax collector's office." (Enacted by California Statutes of 1939, Chapter 154, page 1324, effective February 1, 1941; based on former California Political Code, Section 3767, and portions of former section 3771, Political Code.) Section 3767 of the Political Code, in effect on June 29, 1936, the date the subject property was sold to the State, provided: "The publication must designate the day and hour when the property will, by operation of law, be sold to the state, which sale must not be less than twenty-one nor more than twenty-eight days from the time of the first publication, and the place shall be in the tax collector's office."

The pertinent portions of Section 3771, Political Code, as they existed on June 29, 1936, which were later codified into Section 3436, Revenue and Taxation Code, read as follows:

"On the day and hour fixed for the sale in the delinquent tax list, all property upon which the taxes and assessments of all kinds, penalties and interest have not been fully paid, except as provided in section 3814 of this code, shall by operation of law and the declaration of the tax collector, be sold to the State, * * *."

California Revenue and Taxation Code, Section 3511:

"Not less than 21 days nor more than 35 days after the first publication of the notice of deeding of tax-sold property and at least five years after the property was sold to the State, the tax collector shall, without charge, execute a deed in duplicate conveying the property to the State. The county clerk shall take acknowledgment of the deed without charge." (Enacted by California Statutes of 1939, Chapter 154, page 1326, effective February 1, 1941; amended by Statutes of 1939, Chapter 877, page 2469, effective February 1, 1941; Statutes of 1949, Chapter 243, page 468; Statutes of 1951, Chapter 598, page 1761.) The section as it existed on July 2, 1943, the date of the deed to the State, was as follows: "If the sale of any tax-sold property at public auction is not completed, the tax collector shall, without charge, forthwith execute a deed in duplicate conveying the property to the State. The county clerk shall take acknowledgment of the deed without charge." While the provisions of this section were then different, they tied in with the provisions of former Section 3476 of the Revenue and Taxation Code, enacted by Statutes of 1939, Chapter 154, page 1325, which provided as of July 2, 1943, that: "Not less than 21 nor more than 28 days after the first publication of the notice of sale of tax-sold property and at least five years after the property was sold to the State, the tax collector shall, as prescribed in this chapter, sell at public auction to the highest bidder for cash in lawful money of the United States all tax-sold property which was sold to the State in the fifth preceding calendar year, or any year before that, except that all property sold

by the State for which the full purchase price has not been paid shall be deeded to the State.

> "The sale shall begin at the time given in the published notice of sale and shall continue from day to day thereafter if additional time is needed to complete the sale. The sale shall be in the tax collector's office."

In 1943, the Legislature enacted legislation (California Statutes of 1943, Chapter 362, page 1598, effective May 8, 1943) suspending sales at public auction during 1943 and 1944. These were sections 3490 and 3491, California Revenue and Taxation Code, which provided, as of July 2, 1943, that:

"3490. Notwithstanding the provisions of Section 3476 of this code no sale at auction to the public shall be made of tax-sold property in the years of 1943 and 1944."

"3491. At the day and hour fixed in Section 3476 of this code the property subject to sale to the public shall be deeded to the State as provided in Section 3511 of this code."

By virtue of these sections, the property involved in this action was deeded to the State on July 2, 1943, and has ever since remained in state ownership under the tax deed.

California Revenue and Taxation Code, Section 3521:

"A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later.

"Sections 351 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section." (Added by California Statutes of 1941, Chapter 290, page 1426, effective May 19, 1941, operative June 1, 1941.)

California Revenue and Taxation Code, Section 4101:

"Tax-sold property and, if the right of redemption has not been terminated, tax-deeded property may be redeemed by the redemptioner until the right of redemption is terminated. The 'redemptioner' is the person whose estate has been sold or his successor in interest." (Added by California Statutes of 1941, Chapter 290, page 1430, effective May 19, 1941, operative June 1, 1941.)

California Revenue and Taxation Code, Section 4102:

"The amount necessary to redeem shall be paid in lawful money of the United States and is the sum of the following:

"(a) The amount of sold taxes.

"(b) The delinquent penalties and costs which were a lien on the property at the time of the sale to the State.

"(c) Redemption penalties.

"(d) A redemption fee of one dollar and fifty cents ($1.50) on each separately valued parcel sold to the State subsequent to June 13, 1947."

(Enacted by California Statutes of 1939, Chapter 154, page 1345, as amended by Statutes of 1955, Chapter 255, page 717.)

California Statutes of 1943, Chapter 458, page 1993 (Curative Act, 1943), effective August 4, 1943:

"An act to validate certain acts of counties, cities and counties and of their officers relating to taxation of property.

"The people of the State of California do enact as follows:

"SECTION 1. Every act and proceeding heretofore taken by any county, city and county or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any county or city and county, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, are hereby confirmed, validated and declared legally effective.

"SEC. 2. (a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken.

"(b) This act is limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions.

"SEC. 3. If any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act and the application of its provisions to other persons or circumstances is not affected."

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No. 859. SEARS, TRUSTEE, ET AL. *v.* COUNTY OF CALAVERAS, CALIFORNIA, ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles O. Bruce* for appellants. *Edmund G. Brown*, Attorney General, *E. G. Benard*, *Irving H. Perluss*, Assistant Attorneys General.

and *Edward P. Hollingshead*, Deputy Attorney General, for the State of California, appellee. Reported below: 45 Cal. 2d 518, 289 P. 2d 425.